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Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Establishment of a Class A	)	MM Docket No. 00-10
Television Service	)	MM Docket No. 99-292
	)	RM-9260
	)	

To: The Commission

PETITION FOR RECONSIDERATION.

Sonshine Family Television, Inc. ("SFTI"), licensee of television broadcast station WBPH, Channel 60, Bethlehem, Pennsylvania, through counsel, and pursuant to Section 405 of the Communications Act and Section 1.429(a) and (e) of the rules, hereby submits this Petition for Reconsideration of the FCC's *Report and Order* in the above-captioned proceeding, FCC 00-115, released April 4, 2000, and published in the *Federal Register* in summary form May 10, 2000, 65 *Fed. Reg.* 29985 (the "*R&O*").

In Comments in response to the *Notice of Proposed Rule Making* in this proceeding, FCC 00-16, released January 13, 2000 (the "*NPRM*"), SFTI showed that, in the *Sixth Report and Order* in MM Docket No. 87-268, FCC 97-115, released April 21, 1997, the FCC allotted Channel 59 to Bethlehem, Pennsylvania, as a paired channel allotment for WBPH's DTV operation, making WBPH one of only a handful of television stations with both its NTSC and DTV allotments outside the so-called "core spectrum," Channels 2-51, within which all television broadcasting must be accommodated at the conclusion of the transition to DTV, currently scheduled to occur in 2006. This

causes WBPH and sixteen other stations to be uniquely affected by the provisions of the Community Broadcasters Protection Act (the "CBPA"). On the one hand, the CBPA directs the FCC, in mandatory terms, to assure that all full-service stations, such as WBPH, have the opportunity not only to replicate their existing NTSC service areas but to maximize their DTV facilities by seeking authority for higher power and/or antenna height than provided in the initial DTV Table of Allotments ("the FCC *shall* make such modifications as necessary" in the licenses of Class A LPTV stations, 47 U.S.C. § 336(f)(1)(D) (emphasis supplied)). On the other hand, the CBPA also required full-service stations to file a notice of intention to maximize on or before December 31, 1999, and then to also file a "bona fide application for maximization" on or before May 1, 2000, and "comply with all applicable Commission rules regarding the construction of digital television facilities."

Pursuant to the FCC's *Public Notice*, "Mass Media Bureau Implements Community Broadcasters Protection Act of 1999," released December 13, 1999, SFTI filed a letter with the FCC on December 30, 1999, stating its intention to seek to maximize its facilities. However, as set forth in that letter, however, and in SFTI's Comments in this proceeding, the filing of a maximization application was problematic, because both of WBPH's allotments are outside the core spectrum and SFTI will be unable to identify a channel within the core spectrum for future operation until the end of the DTV transition period. Thus, while SFTI, theoretically, could have filed an application on or before May 1, 2000, to maximize WBPH-DT's facilities on Channel 59, that application (and the facilities constructed pursuant to FCC approval of that application) would be irrelevant to the

spectrum consequences of post-transition operation with maximum facilities on a completely different channel somewhere within the core spectrum.[1]

In its Comments, therefore, SFTI urged the FCC not to require full-service stations with analog *and* DTV channels outside the core spectrum to file maximization applications by May 1, 2000, and to make the service areas of Class A LPTV stations secondary to a future maximization applications by one of the handful of full-service stations so described, if the full-service station had, in good faith, filed a notice of intention to maximize. In support, SFTI pointed to (1) the inequitable consequence of requiring a handful of licensees, already forced to operate for a few years outside the core spectrum, to make additional expenditures to "maximize" temporary facilities; (2) the absence of any benefit to Class A LPTV licensees, because there is no way of determining, at this point in time, what channels will be available for assignment to out-of-core full-service stations at the end of the transition period; and (3) ambiguities and internal inconsistencies in the CBPA and the limited legislative history regarding the maximization application "requirement."

The *R&O*, however, determined that out-of-core full-service stations such as WBPH should be guaranteed the right to maximize facilities within the core spectrum only if they filed maximization applications by the May 1, 2000, deadline. The FCC's disposition of this issue was flawed in several respects. The *R&O* noted but did not discuss comments such as SFTI's which pointed to the additional expenses this would impose on out-of-core full-service stations. It seriously overstated the benefit to Class A LPTV licensees of requiring maximization applications from out-of-core full-

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[1] In fact, for reasons that will be discussed elsewhere in this petition, SFTI did not file a maximization application by May 1, 2000, deadline but instead filed a further letter reiterating its intentention to seek to maximize WBPH-DT's facilities at such time as it is allotted a channel in the core spectrum.

service stations. And the *R&O* did not recognize the ambiguities and internal conflicts within the CBPA, let alone attempt to resolve them. The FCC's failure in the *R&O* to adequately address these issues which had been raised in the comments was arbitrary and capricious and is, itself, reason for reconsideration.

The failure to recognize the ambiguities and internal inconsistencies within the CBPA, let alone attempt to resolve them in a manner consistent with Congressional intent and the overall policy of the statute, is probably the *R&O*'s most serious shortcoming. For, in the light of these ambiguities and inconsistencies, the so-called "balance" which the *R&O* purported to strike (¶ 59) is remarkably unreasonable. Contrary to the apparent position of the *R&O*, the FCC, in resolving this issue, was not hamstrung by the language of Section 336(f)(1)(d). Specifically, new Section 336(f)(7) of the Communications Act directs the FCC not to grant an application for a Class A license unless the applicant shows, among other things, that the LPTV station will not cause interference to "stations seeking to maximize power under the Commission's rules, if such station has complied with the notification requirements in paragraph (1)(D)" and does not mention the obligation of the DTV station to file a maximization application at all. Similarly, the Conference Report, in addressing this section of the statute, refers only to the "notification requirements." *House Conference Report* at H11809. The overall intention of Congress is captured in the provision of the CBPA (new Section 336(f)(6)(B)) which specifically directs the FCC not to issue a Class A license on any of 175 channels referenced in the *Memorandum Opinion and Order* (the "*MO&O*") on reconsideration of the Sixth Report and Order in MM Docket No. 87-268, FCC 98-24, released February 23, 1998, ¶ 44. As the FCC observed both in the *NPRM*, ¶ 25, and in the *R&O*, ¶¶ 104-105, these channels will be part of the spectrum reclaimed at the end of the transition when existing stations end their dual channel

analog TV/DTV operation and begin providing only DTV service on a single channel. While some of those channels will be auctioned to applicants for new DTV facilities, *MO&O*, ¶ 44, that inventory must satisfy the needs of full-service stations such as WBPH whose dual channel operation has been outside the core spectrum during the transition period. By directing the FCC to, effectively, embargo that spectrum, Congress showed that it intended to preclude the FCC from issuing any Class A LPTV licenses which would preclude WBPH and other similarly-situated full-service stations from maximizing their facilities within the core spectrum at the end of the transition period.

Where Congress is ambiguous, or where the provisions of a statute are internally inconsistent or inconsistent with other statutes, the agency has the discretion, if not the duty, to adopt rules that implement the statute in a manner which resolves the ambiguities or inconsistencies in a manner which serves the Congressional purpose. *Career College Association v. Riley*, 74 F. 3d 1265 (D.C. Cir. 1996)(agency has discretion to adopt interpretation that resolves "considerable tension" between statutory provisions); *National Association of Regulatory Utility Commissioners v. SEC*, 63 F. 3d 1123 (D.C. Cir. 1995)(agency has discretion to choose interpretation that balances competing policies where the grammatically correct interpretation of the statute would frustrate the main purpose of the Act).

Given that the FCC was not without discretion in determining how to implement the Class LPTV licensing scheme while preserving the right of WBPH and other similarly situated full-service stations to maximize their facilities once they were relocated to the core spectrum, the *R&O*'s discussion was superficial, based on a false premise, and wholly arbitrary and capricious.

Every other full-service television station in the United States, except for WBPH and sixteen other full-service stations, is guaranteed the right at the end of the transition period to operate on a

specific channel. SFTI and sixteen other television station licensees, alone among all of the television stations in the United States, are obliged to construct a second full-service television station while being also required at the end of the transition period to throw away both their out-of-core NTSC and DTV facilities, without compensation, in exchange for the privilege of building a third full-service station on a yet-to-be-determined channel. The *R&O* aggravates this already inequitable economic penalty on out-of-core stations by making SFTI's right to maximize DTV facilities contingent on applying for and building a more powerful, more expensive, throw-away DTV station on an out-of-core channel.[2]

The *R&O* gives this inequitable result short shrift, at best, describing it (¶ 58) as a mere "inefficiency". The *R&O* asserts (¶ 59) that not requiring maximization applications by out-of-core full-service stations would "reduce[ ] substantially the certainty that can be afforded Class A stations." This rationalization ignores, however, the small number of full-service stations affected and, more importantly, posits a "certainty" that in fact does not exist. The simple fact is that maximizing facilities outside the core spectrum will be of no value in predicting the effect of a particular station's

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[2] For WBPH in particular, the value of maximizing facilities on a channel outside the core spectrum is conjectural if not ephemeral. First, WBPH's Channel 59 DTV allotment is short-spaced to at least six full service NTSC and DTV stations (in Reading, Trenton, Hazleton, New Brunswick, Philadelphia and Baltimore), each of which would operate to limit the extent to which WBPH could increase power or antenna height. Second, in order to avoid the expense of constructing WBPH-DT at a different antenna height, SFTI selected an antenna specifically designed to permit diplexed operation on Channel 59 and Channel 60 with a single antenna. This requires that the patterns of the two stations be exactly the same. Any change in the Channel 59 pattern would necessarily involve a change in the Channel 60 pattern, but any change in the Channel 60 pattern would be precluded by the FCC's decision to prohibit any further power increases by stations on Channels 60-69. In light of these limitations, there was little likelihood that a maximization application would result in a significant increase in coverage and, in any event, maximization on Channel 59 could have been achieved only at substantial additional expense, probably including construction at a different transmitter site.

relocation within the core, because the channel on which it will operate will not be known until all other full-service stations have decided on which of their two channels (NTSC and DTV) they will continue to operate. The only "certainty" resulting from inflexible requirement of maximization applications would be as to the *number* of full-service stations that would seek to maximize, not as to the future maintenance of Class A LPTV service areas.[3] That certainty can be provided by requiring only that out-of-core full-service stations notify the FCC of their intention to maximize facilities once relocated to the core, as provided in Section 336(f)(7) of the Act and suggested in SFTI's Comments, without imposing any further economic penalties on those full-service stations which do not have either an NTSC or DTV channel in the core spectrum.

CONCLUSION

The FCC has the discretion to adopt rules implementing the CBPA which allow full-service stations with no channel allotment in the core spectrum to maximize their facilities following the DTV transition without requiring the filing of an application to maximize facilities on an out-of-core channel. Because the "benefits" cited in the *R&O* of requiring such full-service stations to file an application are illusory and the requirement to file an application and build maximized facilities imposes an unjustifiable economic burden on a handful of full-service stations, the *R&O*'s requirement

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[3] The rule adopted in the *R&O* might even have the consequence of adversely affecting LPTV stations currently operating outside the core spectrum, as maximized DTV facilities would be more likely to receive prohibited interference from LPTV stations.

that such stations file a maximization application and construct maximized facilities as a condition of a guaranteed future right to maximize DTV facilities in the core spectrum is arbitrary and capricious and reconsideration should be granted.

Respectfully submitted,

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